

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

22-CR-109 (LJV)

v.

PAYTON GENDRON,

Defendant.

**SUPPLEMENT IN SUPPORT OF MOTION FOR AN
ADJOURNMENT OF THE TRIAL DATE**

Defendant, Payton Gendron, through undersigned counsel, hereby files this Supplement in further support of his Motion for an Adjournment of the Trial Date.

I. BACKGROUND

Counsel filed their Motion for an Adjournment of the Trial Date and for a Further Pretrial Scheduling Order, ECF No. 303, on March 25, 2025. As part of the Motion, counsel filed a Sealed Ex Parte Supplement, ECF No. 304, outlining in detail the mitigation investigation conducted to date, the critically important areas of inquiry it has opened up and the extensive amount of work still necessary to properly develop those areas, including work with multiple experts that is heavily influenced by schedules outside of our control. Counsel believe that the amount of additional time requested in the Motion is the minimum necessary to enable us to complete the constitutionally mandated investigation into Payton Gendron's psychosocial history and comprehensive evaluation of his mental condition in order to present Payton Gendron's case in mitigation and meet the government's case in aggravation at trial. The Motion further outlines the amount of pretrial litigation that remains to be simultaneously conducted, including complex and fact-intensive suppression motions relating to the extraordinary amount of digital data seized

by law enforcement. And the Motion demonstrates the reasonableness of counsel's adjournment request in light of the typical amount of time between initial charge, notice of intent to seek the death penalty and trial in federal capital prosecutions in this Circuit and in cases of this magnitude nationwide.

On April 4, 2025, the government filed a Response in Opposition to the motion, ECF No. 316, and defense counsel filed a Reply on April 8, 2025, ECF No. 320. The Court addressed the requested continuance at a status conference on April 10, 2024. During that appearance, the Court proposed to commence in-person voir dire on January 5, 2026, with trial to begin at its conclusion. ECF No. 324 at 17. The Court stated that the January 5, 2026, date is not yet set "in stone," and invited further briefing on the timing of the trial of this matter:

I'm not setting the schedule cast in stone. What I'm going to do is ask for submissions from both sides as to reasonable tinkers with the schedule. We're not putting it off for a year . . . I'm not setting the date in stone today, and I am willing to accept reasonable tinkers from both sides, that's where we're going to be. So you can – you can push. You can push back. You can push back as much as you want to push back . . . So what I'm saying is, you can push back, but if you push back—if you say, well, we think we really need a year, you can [be] pretty sure I'm gonna say no. If you say we really think we need a week, you can pretty sure I'm gonna say yes. In between those two, you can't be too sure. Okay? . . . I want . . . a memo from the defense telling me why I'm being unreasonable and proposing alternatives.

Id. at 34-38.

As noted, our original Motion and sealed supplemental filing have set forth the constitutional imperative of the original request to begin jury selection in June, 2026, and to commence in-person voir dire on September 8, 2026. We maintain that, if we are forced to proceed to trial on a more accelerated schedule, we will be unable to render the effective assistance of counsel to which Payton Gendron is entitled under the Sixth Amendment. Not only will we be unable to complete the necessary penalty phase investigation and preparation, but also

our ability to raise and litigate the significant legal issues that remain to be addressed, while simultaneously undertaking the analysis of hundreds if not thousands of jury summonses and questionnaires prior to the commencement of in-person voir dire, will be severely compromised.

However, in light of the Court's unequivocal statement that the requested adjournment will be denied, and the Court's grant of leave to file further briefing addressing an alternative schedule, defense counsel respectfully submit the following.

II. ARGUMENT

a. Under the Court's Proposed Schedule, and Consistent with the Parties' Best Estimates of the Time Required for Individual Voir Dire, the Penalty Phase of the Trial Would Overlap with the Anniversary of the Shooting

As noted, at the status conference on April 10, 2025, the Court proposed to start individual voir dire on January 5, 2026. ECF No. 324 at 17. Under that schedule, however, given the length of time that both parties anticipate will be required for individual voir dire and to present their respective cases at both guilt and penalty phases, there is a serious risk that the jury may be close to, if not actively engaged in, penalty phase deliberations on May 14, 2026, the fourth anniversary of the shattering events that took place at the Tops Market in 2022.

In email communications with the Court in March 2025, the parties confirmed their best estimates of the length of time that will be required to complete individual voir dire and seat a jury—between six and eight weeks, per the government, and between eight and 12 weeks per the defense. If the process were to take eight weeks, the culpability phase of the trial would likely start in early March, 2026. The parties both estimate that the combined length of both culpability and penalty phases will be approximately two months. ECF No. 154 at 40-41. Thus, under the Court's current proposed schedule, penalty phase deliberations would be expected to occur precisely around mid-May 2026 – in other words, on or near the anniversary of the

shooting. The potential prejudice associated with a penalty verdict being returned at that time cannot be understated.¹

Since the shooting in 2022, the volume of news coverage during the two weeks surrounding the anniversary of May 14th, has increased ten-fold as compared to the weekly average for news coverage during non-anniversary weeks.² And, of course, the increase in media coverage is not limited solely to the events of May 14th; significant coverage relates to the philanthropic events borne in the aftermath of the shooting.

Every year, the period of time around May 14th is a significant and emotional one for many members of the Buffalo community. Out of the unspeakable tragedy of that day in 2022 has grown a remarkable social movement, dedicated both to keeping alive the memories of those who lost their lives that day and to promoting and funding a wide variety of programs for the benefit of the wider community.

Beginning on the first anniversary in 2023, remembrance activities included church services, panel discussions, community gatherings, and a charity run. The City of Buffalo held a weekend of events, collectively entitled “5/14 Remembrance Weekend: Reflection, Healing &

¹ The Court has been mindful not to set due dates for pleadings that coincide with the anniversary of the shooting. For example, when the Court inadvertently set the date for a defense reply on May 14, 2025, there was an audible gasp in the Courtroom. *See* ECF No. 273 at 6-7. Recognizing the significance of the date, the Court modified the deadline to avoid the anniversary. The same care should be exercised for the scheduling of trial.

² This average is based on a collection of 891 total articles from 5/14/2022 to 4/15/2025 excluding the anniversary weeks for an average of 5.9 articles/week and a total of 59 articles collected during 05/08/2023 to 05/15/2023 and 05/12/2024 to 05/19/2024. As previously disclosed, in light of our varying news media collection methods since 2022, we believe these estimates to be underestimates. *See* ECF No. 308 at 10. An additional comparison of archived data from local news outlets yielded that same percentage increase in media reports during the anniversary weeks.

Hope,” beginning on May 12 that year.³ The events included a panel discussion on May 12 featuring New York Times bestselling author Dr. Ibram X. Kendi, focused on combating white supremacy and social media radicalization; an educational program for school aged children entitled “Educational Day of Healing & Restoration,” put on by the Buffalo Public School District and partners and streamed on YouTube.com; a community gathering featuring prayer and reflection to honor the lives lost as well as food, music and family friendly activities; a moment of remembrance at the Jefferson Avenue Tops Friendly Market on May 14 itself; and a Memorial Church Service for Healing and Hope, featuring Rev. Dr. Jamal Harrison Bryant of Atlanta, Georgia.⁴ Additionally, a reflective light display shone on the columns of Buffalo City Hall from dawn to dusk throughout the weekend, in colors chosen by the families of the deceased victims as best representing their loved ones.⁵ Community members also marked the anniversary at their homes, turning on their porch lights each evening for the three days leading up to May 14 to remember the victims.⁶

The moment of remembrance at Tops was led by Mayor Brown, who read the names of the 10 deceased victims and the three who were injured as 2:28 p.m. approached and then called for a moment of silence.⁷ Governor Kathy Hochul also spoke, announcing \$10 million in state

³ City of Buffalo Press Release, *Mayor Brown Announces 5/14 Remembrance Events to Honor Lives Lost During the Mass Shooting at Tops*, (May 10, 2023) (available at <https://www.buffalony.gov/CivicAlerts.aspx?AID=1465>).

⁴ *See id.*

⁵ *See id.*

⁶ *See* Maki Becker, *A Simple Way to Honor May 14 Victims: Turn On Your Porch Lights*, Buffalo News (May 10, 2023).

⁷ *See* Maki Becker, *In Their Grief, Families of the May 14 Victims Ponder Painful Questions and Look for Answers*, Buffalo News (May 7, 2023).

funding for the East Side of Buffalo to add to the \$50 million pledged in 2022.⁸ There were hundreds of community members in attendance.⁹ Jefferson Avenue was closed to traffic and dozens of uniformed police officers patrolled the area.¹⁰ That morning, Rev. Al Sharpton spoke to a packed house at a special service at the True Bethel Baptist Church.¹¹ Also part of the anniversary weekend commemorations was a half marathon charity run and 5K run/walk that began at Canisius College, organized by the Lt. Aaron Salter Memorial Scholarship Foundation, set up to raise money for a memorial scholarship in the name of victim Aaron Salter.¹² Lt. Salter's widow also spoke at the Erie County Police Academy at the ceremonial unveiling of a plaque honoring her husband.¹³

The victims were honored by the state Senate and Assembly on May 11.¹⁴ Another full day of panel discussions was held on May 13 at the Montante Cultural Center, this one sponsored by the Buffalo Black Caucus, part of the 5/14 Remembrance Alliance, and chaired by

⁸ See Maki Becker, *More Funding for East Side Homeowners, Mental Health and 5/14 Memorial Announced*, Buffalo News (May 14, 2023).

⁹ See Maki Becker (May 7, 2023), *supra*.

¹⁰ *Id.*

¹¹ See Ali Touhey, *Rev. Sharpton returns to Buffalo to Offer Words of Hope*, WIVB (May 14, 2023).

¹² See Maki Becker (May 7, 2023), *supra*.

¹³ See Buffalo News, *Lt. Aaron Salter's Widow: Aaron Did His Job*, (May 17, 2023).

¹⁴ See Spectrum News Staff, *May 14 Mass Shooting Victims Honored in State Senate, Assembly*, Spectrum News 1 (May 11, 2023).

Zeneta Everhart, mother of injured victim Zaire Goodman.¹⁵ That night, small vigils took place at 14 separate Tops Market locations in Western New York, including one in Aaron Salter's hometown of Lockport that was organized as part of "Operation Tops."¹⁶ The Buffalo Bisons stopped their baseball game on May 14 to remember the victims.¹⁷ The week before the anniversary weekend, the family of victim Celestine Chaney organized a balloon release on May 6, which was her birthday.¹⁸ Chardanay Young-Ford, director of the Buffalo United Resiliency Center- created following the shooting, remarked during an interview that "a year later, the emotions for many are still very fresh . . . and there is anxiety with the anniversary approaching."¹⁹

The following year, 2024, the anniversary was again officially marked by the City of Buffalo. Mayor Brown launched the Blue Flag Initiative, a public art project comprised of dozens of hand-painted blue flags displayed outside the Johnnie B. Wiley Sports Complex, the Frank E. Merriweather Library and other locations along the Jefferson Avenue corridor in Buffalo that grew into the thousands.²⁰ A moment of silence followed by the ringing of church

¹⁵ See Maki Becker, *Gun Violence, Food Justice and Home Ownership to be Discussed at Buffalo Black Caucus*, Buffalo News (May 13, 2023).

¹⁶ See Benjamin Joe, *Prayers for Forgiveness and Healing at Tops*, Niagara Gazette (May 12, 2023).

¹⁷ See Mike Harrington, *Remembering Tops Victims at Sahlen Field*, Buffalo News (May 14, 2023).

¹⁸ See Jon Harris, *'United to Make Change:' Buffalo Resiliency Center Director Recalls Year of Helping Community Heal*, Buffalo News (May 12, 2023).

¹⁹ *Id.*

²⁰ See Harold McNeil, *Blue Flag Initiative Launched to Mark Second Anniversary of Racist Mass Shooting*, Buffalo News (May 14, 2024); Amy Lynn Hardy, *Blues: A 5/14 Memorial, A Project of Grief, Healing, and Community*, Buffalo Spree (June 7, 2024).

bells was held by the Catholic Diocese of Buffalo at 2:28 pm, as the Mayor asked “everyone in the City of Buffalo and across the region to stop what you are doing, bow your heads and reflect on the lives that were taken on that day.”²¹ Like the previous year, the top of City Hall was lit up from dusk until dawn on May 13 and 14 in orange, the color of gun violence awareness and prevention.²² The Buffalo Urban League also sponsored a 5/14 Painting with Love art project across the street from the Tops Market.²³ “Pain and Peace,” a documentary exploring “hatred and forgiveness” that includes an interview with Garnell Whitfield who lost his mother on May 14, debuted in Buffalo.²⁴ The second anniversary was also chosen as the date for the unveiling of an outdoor “honor space” dedicated to the victims at the corner of Jefferson Avenue and Landon Street.²⁵ The space includes a steel sculpture and 10 granite posts, one for each of the decedents.²⁶

Gov. Kathy Hochul again spoke publicly in honor of the victims, this time announcing the projects and programs that make up the state’s “Reimagine: I am the Change” initiative

²¹ See City of Buffalo Press Release, *Mayor Brown Marks 2-Year Remembrance of 5/14 Racially Motivated Mass Shooting at Tops on Jefferson*, (May 13, 2024).

²² See Harold McNeil (May 14, 2024), *supra*.

²³ *Id.*

²⁴ See Kelly Dudzik, ‘Pain and Peace’ Documentary Debuts in Buffalo on 5/14, WGRZ (May 8, 2024).

²⁵ See Samantha Christmann, ‘We Claim Victory Over Hate:’ Tops Markets Unveils ‘Honor Space’ to Commemorate Victims of 5/14, Buffalo News (May 14, 2024).

²⁶ *Id.*

administered by the State Office of Mental Health.²⁷ At night, landmarks all across the state, including the World Trade Center, Niagara Falls, Grand Central Terminal, the Albany Airport Gateway, the State Education Building and Empire State Plaza in Albany, the State Fairgrounds in Syracuse, and Walkway Over the Hudson State Historic Park were lit up in honor of the victims.²⁸ In Washington, D.C., New York representatives reintroduced the Aaron Salter, Jr., Responsible Body Armor Possession Act in the House,²⁹ and Rep. Timothy Kennedy gave a speech commemorating the anniversary and remembering the victims one by one.³⁰

So far in 2025, Legacy 5/14 has announced the Legacy 5.14 5K Run followed by a post-race celebration, to be held on May 10, 2025.³¹ The Buffalo Black Caucus has scheduled another day of events at Canisius College, also on May 10, 2025, that will feature panel discussions on topics including gun violence prevention, Black mental health, environmental racism and jury diversification, as well as art projects, storytelling and a kids track.³² On May 17, 2025, the East Side Bike Club will be hosting its annual Buffalo Solidarity Ride, beginning at Martin Luther King Park, to “honor[] the lives lost and the lives forever changed because of the 5/14 Tops

²⁷ See Gov. Hochul Press Release, *On the Two-Year Anniversary of Tops Shooting, Governor Hochul Highlights Resources to Address Trauma and Mental Well-Being in East Buffalo*, (May 14, 2024).

²⁸ *Id.*

²⁹ See Grace Meng, Press Release, *Meng and Kennedy Introduce Legislation to Keep Enhanced Body Armor Out of the Hands of Mass Shooters*, (May 14, 2024).

³⁰ *Marking Solemn Anniversary of Buffalo Mass Shooting*, Congressional Record Vol. 170, No. 83 (May 14, 2024).

³¹ See <https://514.itsyourrace.com/event.aspx?id=15852>.

³² See https://www.buffaloblackcaucus.com/_files/ugd/0fb4b8_1f175f139b744dae9cd3a6ef97920b18.pdf

shooting.”³³ And on the evening of May 15, 2025, Tops Market is sponsoring a program at the Buffalo Art Museum entitled “One Race: The Human Race,” with featured speakers Emmy Award winning Poet Laureate Jillian Hanesworth and historian and best-selling author Emmanuel Kulu, Jr.³⁴

Along with coverage of all of these community events, local media outlets also run extended commemorative tributes around the anniversary every year, recapping the events of May 14, 2022, and providing updates on the families of the victims and of the progress of change that was promised to the local community in the wake of the shooting.³⁵

While we anticipate the Court directing the jurors not to read, view or listen to media coverage, the reality is that the news and related events are far reaching and impact the community as a whole. Jurors would inevitably be exposed to media coverage or community events related to the shooting. Conducting the trial, particularly any portion of the penalty phase, during the anniversary of the shooting risks significant and irremediable prejudice to Payton

³³ See <https://www.buffalorising.com/2025/04/2025-buffalo-solidarity-ride>.

³⁴ See <https://www.eventbrite.com/e/one-race-the-human-race-tickets-1302435181689?aff=oddtcreator>

³⁵ See, e.g., Stephen T. Watson and Harold McNeil, *Two Years After 5/14 Attack, Change is Slow to Come to the East Side*, Buffalo News (May 12, 2024); WGRZ, *Buffalo Remembers 5/14: Hope and Healing* (May 12, 2023) (33-minute television special featuring interviews with victim families, survivors and community members); Buffalo News, *One Year Later: The Legacy of 5/14* (May 15, 2023) (27-minute video memorial that is a “culmination of a year of coverage by Buffalo News journalists); Maki Becker, *Buffalo Pauses Exactly at One-Year Mark to Remember 5/14 Massacre*, Buffalo News (May 14, 2023); WIVB, *5/14 Remembrance Special: Reflections One Year After the Buffalo Mass Shooting* (May 14, 2023) (hour-long television special report); Spectrum News 1, *May 14th: Resilience and Recovery*, (May 14, 2023) (hour-long television special report); WKBW, *Buffalo Strong Conversations – 5/14: One Year Later, Jefferson 10 Families Reflect*, (May 11, 2023) (two 55-minute television specials, one featuring interviews with victims’ families and one focusing on conversations with community leaders about what has changed since 5/14/22); WBFO, *May 14 Remembrance 2024*, (collection of articles and podcasts commemorating the two-year anniversary).

Gendron's right to a fair trial.

Accordingly, the defense requests that, at a minimum, the Court adjust the current proposed trial schedule to allow for proof to commence on or after June 1, 2026. With this schedule, the Court can set dates for questionnaires to be sent out in late 2025, and the commencement of in-person voir dire in March or April 2026. This schedule avoids the prejudice associated with a trial of this case on or around May 14.

b. The Requested Adjournment is Consistent with Appropriate Capital Case Comparators

In its Response to the Motion, ECF No. 316 at 26-28, the government rejected comparisons of Payton Gendron's case to other federal capital prosecutions in this Circuit (other than Saipov), instead pointing to the timelines of other mass shooting cases that have been tried elsewhere, namely, Tsarnaev, Roof, and Bowers. As we pointed out in our Reply, ECF No. 320 at 5-6, the time to trial in both Saipov and Bowers exceeds the request in this case. Recent developments in Roof demonstrate that it is an inappropriate comparator.

On April 17, 2025, Roof filed a Motion to Vacate, Set Aside, or Correct Conviction and Sentence Pursuant to 28 U.S.C. § 2255. *United States v. Roof*, No. 2:15-CR-00472-RMG; ECF No. 1057 (D.S.C. Apr. 17, 2025). Attached to that motion is the declaration of David I. Bruck, Roof's lead trial counsel. *Id.* at ECF No. 1057-5. As described in the motion, at the time of his federal trial, Roof was being simultaneously prosecuted by both state and federal authorities. Attorney Bruck's declaration makes two factors unmistakably clear. First, the accelerated trial schedule was driven by counsel's singular desire to ensure that the federal case went to trial before the state prosecution could begin. And second, as a result, the time permitted for pretrial preparation was grossly inadequate. In his declaration, Mr. Bruck states that he "decided [he] wanted to invoke Dylann's speedy trial rights and go to trial on the federal case before the state

had a chance to try him.” *Id.* at 2, ¶ 11. Counsel made the following observations regarding his unpreparedness given the resulting trial schedule:

- Counsel believed the court would have granted an adjournment with reasonable notice, nevertheless he “was committed to the notion of going to trial in the federal case first. ***The result was that we went to trial before we were ready.***” *Id.* (emphasis added)
- “When I invoked Dylann’s speedy trial rights, I began to refer to this as “mission impossible.” ***I did not think we were ready for trial in November 2016.*** It was an impossible mission; we were just hoping to do the best we could. At that time, I did not anticipate the disaster that was coming.” *Id.* at 3, ¶ 13 (emphasis added).
- “The decision to go to trial in November 2016 was made based on incomplete information and prior to having secured the assistance of critical experts and key members of the defense team.” *Id.* at 3, ¶ 15.
- “Not only were we not ready for trial, but we did not build in enough time to work with our client and prepare him for trial.” *Id.* at 4, ¶ 18. Roof ended up discharging counsel and proceeding *pro se* throughout jury selection and all of the penalty phase.
- A consulting psychiatrist told counsel that he needed to begin preparing his client for the penalty phase mental health presentation: “He advised that this would take time. We did not appreciate the need for that time.” *Id.* at 4, ¶ 19.
- After a devastating rupture in his relationship with his client following Roof’s discovery of counsel’s intent to offer mental health evidence at the penalty phase, “[w]e did not have time to work with him to repair the damage to our relationship.” *Id.* at 6, ¶ 27.
- “I failed to understand my client. This failure was borne, at least in part, by my rush to trial and my failure to heed the advice of my co-counsel and our experts.” *Id.* at 13, ¶ 61.

Declarations by cocounsel support Mr. Bruck’s sworn statements about the team’s unpreparedness for trial: “The biggest obstacle the team faced was time. We needed more time to perform the necessary work. ***We were trying to run a marathon at the speed of a sprint.*** The case was the most difficult one I’ve worked on; it was so complex, and the client dynamics were complicated.” Declaration of Kimberly Stevens, ECF No. 1057-6 at 1, ¶ 5. “We weren’t ready.

We did what we could, but in our rush, we missed issues.” *Id.* at 2, ¶ 14. One of the defense lawyers appointed to represent Roof in the state prosecution confirms that the federal case “moved extremely quickly” and “[i]t was like we were on a speeding train.” Declaration of Teresa L. Norris, ECF No. 1057-12; at 2, ¶13. Attorney Norris states that a joint meeting of the state and federal defense teams was held approximately a month before the federal case went to trial. At that meeting, “some team members expressed concern that the federal team could not be ready for the November trial date and should make a record as to why they were not ready and ask for a continuance.” *Id.* at 2, ¶ 17. That did not happen. On January 10, 2016, Dylann Roof was sentenced to death by the federal jury. ECF Nos. 868, 871. In light of these facts, it would be folly indeed to rely upon the time to trial in the Roof case to determine what is reasonable here.

III. CONCLUSION

In light of the foregoing, the undersigned request an adjustment to the Court’s proposed schedule to allow for the commencement of trial proof on or after June 1, 2026. This represents a modest adjustment to avoid having any portion of the trial proof or verdicts coincide with the anniversary of the shooting.

Dated: April 24, 2025
Buffalo, New York

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